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Williams, John Robert

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Responsibility, Law and the Family

Edited by Jo Bridgeman, Heather Keating and Craig Lind



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State Responsibility and the Abuse of Vulnerable Older People: Is there a Case for a Public Law to Protect Vulnerable Older People from Abuse?

John Williams

Introduction

The end of the 20th century saw an increasing awareness of the abuse, in a variety of different settings, of people at risk. The Field-Fisher Report into the death of Maria Colwell highlighted the inadequacies of the existing law protecting children from abuse within their home environment (Field-Fisher 1974, 120). This was the first of a series of reports identifying weaknesses in child protection law and procedures. More recently, Lord Laming's report into the death of Victoria Climbié concluded that

Not one of the agencies empowered by Parliament to protect children in positions similar to Victoria's – funded from the public purse – emerge from this Inquiry with much credit. (Laming 2003, para 1.18)

Law, policy and procedures were in place, but human and institutional failings contributed to her death. In the late 1960s Erin Pizzey challenged the perception that domestic violence did not happen, or that if it did happen it was a 'working class' phenomenon justified by some as being the exercise of a male prerogative.¹ When Pizzey opened her refuge in Chiswick, it confirmed that domestic violence was extensive and not confined to one social class. Pizzey could be summing up the attitude towards elder abuse when she wrote,

It would probably take a Charles Dickens to do full justice to the labyrinth of indifference, red tape, callousness, and simple incompetence that exists between people in need and so many of the agencies that are meant to help them. (Pizzey 1974, 91)

She refers to 'hands being compassionately washed in all directions'. The refuge attracted people from all parts of the country, classes and roots (Pizzey 1974, 23). Increased awareness of domestic violence has led to practical, procedural and legal

¹ For an interesting discussion on this point see Doggett 1992, 1-10.

reforms (Part IV, Family Law Act 1996). It would be complacent and misleading to suggest that these reforms have ended domestic violence; clearly they have not! However, they have increased public awareness, required agencies such as the police and housing authorities to respond, and provided civil law remedies for the victims of violence. In addition, domestic violence is now more likely to be regarded as a crime rather than as a purely 'social', 'domestic' or 'welfare' matter (Cretney and Davis 1996).

Elder abuse is finally following suit. It has left the denial stage and has entered the 'something must be done' stage. However, there remains a governmental reluctance (in Wales and England) to address it anything other than in a minimalist way. It is disturbing that given the experience of domestic violence and child abuse, we continue to debate whether there is a need for legislation to protect older people at risk. The private law remedies under the Family Law Act 1996 may be available to some victims of elder abuse. But not everyone is covered. Social exclusion, poverty, and lack of support and advocacy services often prevent vulnerable older people from availing themselves of private law remedies. This chapter considers whether there is a need for a public law designed to protect vulnerable older people (and adults at risk in general) from abuse. If so, how should the responsibility of the state towards older members of society be balanced against the state responsibility to ensure respect for their private and family life? How intrusive should such a law be?

Unlike the law of children, the legal responsibility of the state towards older people is found in a labyrinth of statutes that are complex, lacking in consistency and thoroughly confusing. It is ironic that we still rely on the National Assistance Act 1948 (albeit in amended form) as the key piece of the legislative framework for 21st century community care. Contrary to common belief, the National Health Service and Community Care Act 1990 did not provide a codified law on community care services; in many respects it added to the complexity. In seeking to describe the responsibility of the state towards older people in general, and vulnerable older people in particular, the best that can be said is that it is welfare in its approach and focused on the provision of welfare-based services. For example, section 47 National Health Service and Community Care Act 1990 provides a right to be assessed if a person may be in need of community care services; once assessed the person may be entitled to the provision of services depending upon eligibility criteria (Department of Health 2003). The 'right' to be assessed is one of the few rights that exist in this area of law; the provision of services is rarely an absolute right and eligibility criteria are often dependent upon availability of resources.² However, in some instances the law imposes a responsibility on the state additional to welfare provision. This tends to be targeted on specific groups and not of general application. For example, section 135 of the Mental Health Act 1983 enables an approved social worker to make an application to a magistrate for a warrant authorising the police to enter private premises to search for and remove to a place of safety an adult believed to be suffering from a mental disorder. The rarely used section 47 of the National

² See Lord Clyde in *R v Gloucestershire CC ex parte Mahfood* [1997] 2 WLR 459 at 474 and Lord Woolf MR in *R v Sefton MBC ex parte Help the Aged* (1997), 1 CCLR 57 at 671; see also Department of Health 2003, para. 52.

Assistance Act 1948 enables a local authority to apply to the magistrates for an order removing a person from their home on the grounds of 'grave chronic disease or, being aged, infirm or physically incapacitated, is living in insanitary conditions'.

Despite these and other provisions under, for example, the Care Standards Act 2000, the basic responsibility of the state, and in particular local authorities, is the provision of welfare support rather than protection from abuse. This restricted form of state responsibility is directly challenged by the Human Rights Act 1998 (HRA 1998). Section 6 HRA 1998 states that it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. As will be discussed below, the Article 3 rights not to be subjected to inhuman or degrading treatment impose a positive obligation on the state to protect vulnerable older people from abuse. The provision of welfare support alone is inadequate. This chapter will consider whether the state is adequately meeting its responsibilities under the European Convention on Human Rights (ECHR) towards vulnerable older people at risk of, or experiencing, abuse.

Protection versus Autonomy

Any public law protection for older people at risk of abuse would be controversial and fraught with difficulty. While such a law might well meet the responsibility of the state under Article 3 of the ECHR to protect people from inhuman and degrading treatment in public it might undermine the right under Article 8 to respect for a family and private life. And it might, in effect, undermine the individual autonomy of older people. We must ask how far the state can go in its interference with an individual's right to autonomy and self-determination. Is it possible to incorporate adequate safeguards into any developed public law that would ensure an appropriate balance between the two rights? The following case studies identify some of the dilemmas that arise in trying to formulate a protection of adults at risk law.

1. Sioned is 85 years old. She is physically very frail and is reliant on her son and daughter-in-law for mobility, personal hygiene, nutrition and for getting into and out of bed. Mentally she is very alert and completes *The Times* crossword every day. Tom, her social worker, and Megan, her doctor, are very concerned about bruising on Sioned's body; the bruising is consistent with regular and severe beatings. Both professionals have serious concerns about Sioned's personal safety. When questioned, Sioned tells Tom and Megan to 'mind their own business'.
2. Steffan is 60 years old and suffers from severe bouts of depression; he lives at home with his younger brother Dafydd, although he is relatively independent and has a part time job at the local hospital. Steffan enjoys living with Dafydd – it gives him some security and he fears (rightly or wrongly) that if this arrangement broke down, he would have to live in some form of sheltered accommodation. Steffan is aware that Dafydd steals between £10 and £20 a week from his wallet. This leaves Steffan short of money, although he thinks that this is a 'price worth paying' for Dafydd's company.

3. Beth and Sion have been married for 50 years. It has been a stormy relationship, but things are better now. On occasions, Beth will slap Sion; these are rare occurrences, but they do produce bruising. For most of the time the relationship works better than it has ever done. This is important for Sion.

Each of these scenarios identifies a tension between the protection older people might need and their autonomy. They invite a response from professionals about what would be a proportionate form of intervention; this is the contentious issue.

What is Elder Abuse?

Within the United Kingdom, there is relatively little research into elder abuse; this is in contrast to the United States of America, where there is a significant body of research, including studies into the legal response to abuse. One consequence of the paucity of United Kingdom research is that there is no settled definition of the term 'elder abuse'. An agreed definition would enhance the quality and quantity of research undertaken into the issue.³ It is also a prerequisite to any form of statutory or guidance-based intervention procedures. In formulating a definition, it is necessary to identify its key components. A research seminar, hosted by the Department of Health,⁴ and consisting of an interdisciplinary group of participants, identified the following key components of any definition:

- An understanding of the scale and variance of vulnerability, including the impact of perceived as well as actual vulnerability;
- Abuse and its different components e.g. financial, sexual, physical, psychological, social, neglect;
- Abuse in its different settings e.g. home, institution, sheltered housing, day care;
- Abuse in terms of the different responses required e.g. research, direct services, information provision, and advocacy;
- The role of different types of carers, the interaction between them and those in receipt of such caring, and the dynamics of caring that might contribute to or exacerbate abuse;
- Whether or not an element of trust is required between the abuser and the abused (in relation to the definition of abuse) (Action on Elder Abuse 2002).

In broad terms, these components require the definition to identify the class of people to whom it applies and the form of the abuse. Linked to that second aspect are issues such as the setting, the relevance of a relationship of trust and the nature of the abuse (physical, financial, sexual, etc). An abuse of trust is a key component of any definition. Action on Elder Abuse define elder abuse as:

3 For an interesting overview of the various definitions, see Glendenning 1997, 13-41.

4 Held on 20 January 2002.

A single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person. (Action on Elder Abuse 1995)

This usually involves a family member, a carer or a professional care worker.

The definition of 'elder' for the purposes of elder abuse is also important. It would serve as the threshold for intervention – which may range from a watching brief to some form of criminal investigation and possible prosecution. There is much discussion and disagreement on the definition of 'old age'. In itself, being 'old' does not mean that a person should be treated differently from anyone else. The key element at issue is not really age at all, but the degree of vulnerability. Age may increase the likelihood of vulnerability, but not inevitably. Vulnerability arises in consequence of disability (physical or mental), lack of capacity, frailty, or through heavy dependency on an abuser. Thus, the definition has to address vulnerable older people rather than just older people.

In assessing vulnerability, the autonomy of the individual and his or her right to a private life under Article 8 is relevant. The proportionality of the state's response to elder abuse must be informed by the need to balance the duty to protect the person against their right to determine how they would wish to live. In scenario (2) above, for example (where a few pounds was stolen by the brother), the older person may appropriately concede that the loss does not matter: the continuation of the relationship with the brother is of more value than the money stolen. In addition, the individual may be concerned that, unless the statutory agencies can match the level of practical support that the carer provides, intervention would be detrimental. Whereas the carer's 'abuse' might be 'wrong' and ideally should be 'dealt with', it is difficult to deny the competent and independent older person the right to prevent intervention; their decision to live their life in this way is worthy of respect even if it may cause anxiety for professionals. The position may be different if the older person was also vulnerable as a result, for example, of a severe physical disability (see scenario (1) above, for example, in which the older person is confined to a wheelchair). In such cases, vulnerability and the need for protection may outweigh the right to respect for a private life.

The Department of Health and the Welsh Assembly have also addressed the problem of defining vulnerability. Their guidance on developing and implementing multi-agency vulnerable adult abuse protection procedures, *No Secrets* (Department of Health and Home Office 2000) and *In Safe Hands* (National Assembly for Wales 2000) follows the wording proposed in the Lord Chancellor's consultation paper, *Who Decides* (Lord Chancellor's Department 1997, para 8.7). A vulnerable adult is a person,

who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself or unable to protect him or herself against significant harm or exploitation. (paras. 2.13 and 7.3 respectively)

The reference to 'community care services' in this definition incorporates section 46(3) of the National Health Service and Community Care Act 1990, which defines

them as services which a local authority may provide, or arrange to be provided, under Part III of the National Assistance Act 1948, section 45 of the National Health Service and Public Health Act 1968, section 21 of and Schedule 8 to the National Health Act 1977, and section 117 of the Mental Health Act 1983.

The advantage of this definition is that it links adults at risk and protection procedures to a client group identifiable for the purposes of eligibility for community care services. However, whether a person is or may be in need of community care services under the 1990 Act is not directly relevant to whether they are vulnerable for the purposes of adult protection procedures. An older person may be vulnerable, but not in need of community care services. A physically and mentally fit older person coerced into parting with money by an abusing relative will be in need of protection rather than community care services. Indeed, they may be ineligible for community care services under the 1990 Act. Similarly, some forms of psychological abuse may be driven by the strength of the abuser's personality rather than the need of the abused person for community care services. The link with eligibility for community care services illustrates a welfarist approach to abuse.

It is interesting to note the language used when discussing such behaviour towards older people. We talk about elder abuse. This is not the language another adult would use to the police to describe an attack – even by a non-stranger. Criminal or quasi-criminal language – ‘assault’, ‘attack’ and ‘grievous bodily harm’ – is most likely to be used. This choice of language reflects, or may cause, a criminalisation or a ‘welfarisation’ of such behaviour. The abuse of older people is perceived of solely as a welfare problem that requires a welfare-based response.

The second part of the *No Secrets* and *In Safe Hands* definition deals with an essential component of vulnerability, namely the inability to protect against ‘significant harm or exploitation’. This may arise because of the physical or mental frailty of the individual; it may also arise because of financial dependency, care dependency or the dominant personality of the abuser.

The Scottish Law Commission in its report, *Vulnerable Adults*, also discussed the definition of ‘vulnerable’. The Commission recommended that,

- A vulnerable adult should be defined for the purposes of this report as an adult who is unable to safeguard his or her personal welfare, property or financial affairs, and is:
- (a) in need of care and attention arising out of age or infirmity or
 - (b) suffering from illness or mental disorder; or
 - (c) substantially handicapped by any disability. (1997, para 2.17)

The Commission felt that short-term protective measures should be linked to longer-term responsibilities possessed by local authorities. Section 94(2) of the Social Work (Scotland) Act 1968 provided a useful basis for the ‘person in need’ concept used in paragraph (a) of the recommendation.⁵ The justification for this approach is revealing

⁵ Section 94(2) of the 1968 Act at the date of the report stated that ‘persons in need’ means persons who, ‘(a) are in need of care and attention arising out of infirmity, youth or age; or (b) suffer from illness or mental disorder or are substantially handicapped by any deformity or disability; or ... (d) being persons prescribed by the Secretary of State who have asked

and based on the need to limit the extent of local authority responsibility in this area. In rejecting a dictionary-based definition of ‘vulnerable’, the Commission stated,

A much narrower definition of vulnerable was said to be needed, many respondents commenting that at some point in their lives almost everyone was vulnerable in the sense we used in our discussion paper. We appreciate the force of this criticism. A wide definition would place too great a strain on local authority resources and would make it impossible for the local authority to confine its attentions to those genuinely in need of them. (Scottish Law Commission 1997, para. 2.13)

The first sentence makes a reasonable point; vulnerability is something that we all experience, very often only as a transient status because of illness or an accident. To propose that statutory or guidance-based procedures should be available to everybody is unrealistic. In the discussion paper preceding the report the Commission proposed a dictionary definition:

“vulnerable” should refer to people who were “capable of being wounded, liable to injury, or hurt to feelings: open to successful attack: capable of being persuaded or tempted ...” (para. 2.9)

At this stage, the Commission was not convinced that it was desirable to enumerate the possible causes of vulnerability. After considering the responses to the consultation exercise, the Commission concluded that there was a need to restrict the definition, partly, as noted above, in recognition of the resource implications.

In many respects the way forward may lie somewhere in between the discussion paper’s tentative suggestion and that of the final report. It is necessary for the term to be context sensitive otherwise local authorities would spend much of their time investigating cases that could be dealt with in other ways. However, for that context to be defined according to welfare-based statutes, the concept of ‘person in need’ is unduly restrictive and reinforces the welfare response to abuse. It is, surely, sufficient that vulnerability is a consequence of age or disability rather than that the person happens to fall within a definition designed for other purposes.

The Adult Support and Protection (Scotland) Act 2007 introduces a self-contained definition of ‘adults at risk’. It severs the link between vulnerability and welfare-based legislation:

- (1) “Adults at risk” are adults who—
- (a) are unable to safeguard their own well-being, property, rights or other interests,
- (b) are at risk of harm, and
- (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.
- (2) An adult is at risk of harm for the purposes of subsection (1) if—
- (a) another person’s conduct is causing (or is likely to cause) the adult to be harmed, or
- (b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.

for assistance, are, in the opinion of a local authority, persons to whom the authority may appropriately make available the services and facilities provided by them under this Act.’

Two points should be noted. First, there is no specific reference to age. Second, it includes self-harm, which presumably may involve professionals making judgements about the way people choose to live their lives. To what extent do we allow people to adopt a style of life that may put them at risk of harm?

The Prevalence of Elder Abuse

There have been many attempts to estimate the prevalence of elder abuse. The House of Commons Health Committee stated that the only estimate then available was that half a million older people at any one time were experiencing abuse (House of Commons Health Committee 2003, para. 31). At a more specific level, Mr Denzil Lush, Master of the Court of Protection, in his evidence to the Joint Committee on the Draft Mental Incapacity Bill put forward his 'hunch' or 'instinctive assessment' that financial abuse occurs in about 10 to 15 per cent of cases involving enduring powers of attorney. Of this, 2 or 3 per cent was probably criminal in nature; the remainder was 'unethical' (Joint Committee on the Draft Mental Incapacity Act 2002a). This is rather ironic given that enduring powers are intended as a form of protection from abuse.

A major United Kingdom study of the abuse and neglect of older people was undertaken by King's College, London, and the National Centre for Social Research (Mowlam et al. 2007). It does not include stranger crime nor does it include abuse in institutional settings. The findings reveal that there are approximately 342,400 people aged 66 years and over who are subject to some form of mistreatment. This figure only covers people living in private homes (including sheltered housing) and involves incidents involving neighbours and acquaintances. This means that approximately 4 per cent of that age group experience abuse. Neglect is the main form of abuse, reported by 1.1 per cent of the age cohort. This is followed by financial abuse (0.7 per cent), psychological abuse (0.4 per cent), physical abuse (0.4 per cent), and sexual abuse (0.2 per cent). Fifty-one per cent of the perpetrators were spouses or partners; 49 per cent were other family members. Care workers represented 13 per cent and 5 per cent were close friends. Respondents were able to mention more than one person in their responses.

The impact of abuse on older people was significant. The report concluded,

The impacts included a raft of psychological impacts including emotional distress, loss of self-confidence and self-esteem, depression, thoughts of suicide and/or self harm and, in extreme cases, long-term abuse could result in uncharacteristic and unplanned physical retaliation. Some respondents became socially isolated; others experienced a loss of independence. Also evident were negative impacts on physical health, financial loss, and a change to family relationships.

Respondents would typically experience a combination of different types of impacts, such as emotional distress, social isolation and a loss of self-confidence. Impacts described by respondents were often multiple in nature and those such as emotional distress, social isolation, depression and loss of self-esteem and self-confidence were typically experienced across a wide range of different cases. (2007, 44)

Government Guidance

No Secrets and *In Safe Hands* aim to provide a 'framework for action within which all responsible agencies work together to ensure a coherent policy for the protection of vulnerable adults at risk of abuse and a consistent and effective response to any circumstances giving ground for concern or formal complaints or expressions of anxiety' (2000, para. 1.1). The HRA 1998 places a responsibility upon governments to consider how best to respond to growing concerns about elder abuse. Article 3 of the ECHR imposes a positive duty on states to protect against inhuman or degrading treatment. *X v Netherlands*⁶ and *A v UK*⁷ reinforce the fact that this duty applies regardless of the locus of the abuse and of the identity of the perpetrator; they also emphasise that the duty under the Article is all the more compelling in respect of vulnerable people. At the same time, the state has a duty under Article 8 to protect the right to a private life, especially decision-making autonomy. If the state wishes to interfere with that right, then it must ensure that such interference is ECHR compliant. Prior to *No Secrets* and *In Safe Hands*, there was little by way of formal guidance to ensure that authorities had appropriate regard to the need to balance these two competing sets of rights. Many local authorities had introduced adults at risk protection procedures, although their effectiveness was questionable as they lacked the backing of central government guidance. *No Secrets* and *In Safe Hands* adopt the same interdisciplinary approach as the child protection equivalent, *Working Together* (Department for Education and Skills 2006). It sets out the roles and responsibilities of different agencies, outlines the manner in which joint agency working can be achieved, sets out processes that should be followed when abuse is suspected, and emphasises the importance of training and development. However, one crucial difference between the two documents is that whereas *Working Together* exists within a clear and cohesive statutory framework, *No Secrets* and *In Safe Hands* operate within a legal vacuum. In child protection cases the Children Act 1989 provides legal authority for intervention in the form of care orders (s. 31), child assessment orders (s. 43), emergency protection orders (s. 44), and a general police power to remove children at risk from dangerous situations (s. 46). Of particular importance is the existence of a statutory duty on local authorities to investigate cases of suspected child abuse (s. 47). This is supported by powers to assist in the discovery of children who may be in need of emergency protection (s. 48). It is unacceptable indiscriminately to incorporate principles of child protection law into any vulnerable adult protection law. Nevertheless, the ability to reinforce the principles in *Working Together* by reference to the statutory code enhances the effectiveness of the interdisciplinary approach.

This statutory basis is lacking in cases of the abuse of those who are older and at risk. The National Health Service and Community Care Act 1990 does not permit compulsory intervention in the lives of abused adults; it simply provides for the assessment and possible provision of services for those deemed to be in need. Whereas the child protection worker will have recourse to the Children Act

6 (1985), 8 EHRR 235.

7 (1998), 5 BHRC 137.

1989 if action is required and the family or carers are being obstructive, the adult services worker must rely on professional skills; these may be inadequate to protect the abused person.

No Secrets and *In Safe Hands* were issued under section 7 of the Local Government Social Services Act 1970:

Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.

The need to adhere to guidance has been emphasised in a number of recent cases. In *Re C (Adoption: Religious Observance)*,⁸ for example, Wilson J said 'although only guidance, it is issued under section 7 of the Local Authority Social Services Act 1970, with the result that agencies are required to act under it' (at para. 35). However, the ability of local authorities to adhere to the guidance is compromised by a lack of adequate funding. In its evidence to the Joint Committee on the Draft Mental Incapacity Bill, the Association of Directors of Social Services said,

It must be emphasised that Local Authorities have not been resourced for the additional responsibilities given to them under the "No Secrets" guidance, and are not in a position to undertake additional responsibilities effectively without further resources. (Joint Committee on the Draft Mental Incapacity Bill 2002b)

The lack of a statutory duty to investigate cases of suspected abuse alongside a lack of resources makes it difficult for local authorities to meet their wider responsibilities.

No Secrets and *In Safe Hands* emphasise the need to report cases of suspected vulnerable adult abuse. As abuse almost inevitably involves the commission of a criminal offence, it emphasises the importance of reporting concerns to the police. *No Secrets* states,

early referral or consultation with the police will enable them to establish whether a criminal act has been committed and this will give them the opportunity of determining if, and at what stage, they need to become involved. (para. 6.8)⁹

The necessity to report is not confined to serious criminal offences, but to any form of abuse. Minor offences such as petty theft fall within the paragraph. In part, this enables an accurate profile to be constructed; unless such incidents are logged, it is difficult to identify whether a particular incident was an isolated incident, or part of a pattern of abuse. Involving the police does not necessarily mean that a full criminal investigation is commenced. A proportionate response is necessary that has regard to the autonomy of the individual as well as their right not to be subjected to inhuman or degrading treatment.

⁸ [2002] 1 FLR 1119.

⁹ See, too, National Assembly for Wales 2000, para. 8.6.

Is there a Case for New Legislation?

In its report, *Mental Incapacity*, the Law Commission made a number of recommendations for the reform of the public law protecting vulnerable people at risk (Law Commission 1995). It pointed out the inadequacies of existing law, namely its ineffectiveness and insensitivity to people's civil rights. The recommendations included placing social services departments under a duty to investigate the circumstances where they have reason to believe that a vulnerable person is suffering or likely to suffer significant harm or serious exploitation (paras. 9.15-16). Where their efforts were being frustrated, the authority should have power to enter premises and interview the person concerned (para. 9.19); apply to the court for an entry warrant (paras 9.21-23), an 'assessment order' (paras 9.24-26), or a 'temporary protection order' (paras 9.28-34).

To take account of self-determination, the Commission recommended that where the person objects, the powers should not be exercised, unless that person is unable to make a decision because of 'mental disability.' Finally, it recommended that magistrates' courts should have power to grant warrants or make orders for the protection of adults at risk.

The government responded to these proposals with a consultation paper, *Who Decides?* (Lord Chancellor's Department 1997). It challenged the need for public law measures. The Lord Chancellor, in a statement to the House of Lords said,

The Government believes that, although there may be merit in some of the Law Commission's recommendations concerning these new provisions, there may not be a pressing need for reform in the light of powers which already exist in this area.¹⁰

In *Who Decides?* the government was not specific as to what the 'powers that already exist' are. It said that 'a number of initiatives have been undertaken to address the particular problem of elder abuse, and these cannot yet be fully evaluated' (Lord Chancellor's Department 1997, para. 8.6). *Who Decides?* did not refer to the public law proposal.

In questioning the need for further reform the government upheld the 'right of individuals to live in isolation', better known as autonomy (Lord Chancellor's Department 1997, para. 8.6). Medical law reinforces autonomy. In *Re T (Adult: Refusal of Treatment)*,¹¹ which involved the refusal of a blood transfusion, Lord Donaldson MR said that a person with legal capacity has the right to consent to, or refuse medical treatment 'notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent' (at 653). The judiciary's commitment to this principle is illustrated by its recognition that a woman has a right to refuse a caesarean operation,¹² and a patient advised that the amputation of his leg was essential to save his life, has the right to refuse the treatment.¹³ This emphasis

¹⁰ Hansard, HL, vol. 584, col. 157 (10 December 1997).

¹¹ [1992] 4 All ER 649.

¹² See *St George's Healthcare NHS Trust v S (No 2)* [1998] 3 WLR 936.

¹³ *Re C (Refusal of medical treatment)* [1994] 1 All ER 819.

on autonomy is recognised in the Mental Capacity Act 2005. Section 1(4) of that Act preserves the right to make an 'unwise decision'.

The incorporation of the ECHR into our domestic law by the HRA 1998 imposes a duty on the courts and 'public authorities' to guarantee enjoyment of Convention rights. Under Article 8(1) private life includes (but is not confined to) the notion of the 'inner circle'.¹⁴ This inner circle embraces the right of people to enjoy their private life without interference from the state – a right to 'live in isolation'.

The other argument against new legislation is that existing law and procedures are adequate. However, current law does not provide a unified and coherent response to elder abuse; it fails to address the need for clearly defined powers in extreme cases. Whereas *No Secrets* and *In Safe Hands* have ensured the introduction of protection policies and procedures across England and Wales, they exist within a legal vacuum. They are a useful start and contain a framework for a better interdisciplinary approach to vulnerable adult abuse, but they do not provide adequate protection in extreme cases.

Perhaps the most compelling argument in favour of new legislation is that vulnerable adult abuse is still with us. However, it is important not to overstate the impact that law can have. Child abuse is still with us, yet we have had child protection legislation for over one hundred years. Laws do not solve social problems like these, but they may contribute to a much broader, interdisciplinary approach to the prevention of abuse. *Re F*¹⁵ highlights the shortcomings of existing law. An 18-year-old woman, T, with a mental age of between five and eight years lacked legal capacity. The local authority accommodated her, with the consent of her parents, just before her 17th birthday. But her parents later withdrew their consent. Butler-Sloss P in the Court of Appeal described T's family background as follows:

The case for the local authority disclosed a picture of chronic neglect, a lack of minimum standards of hygiene and cleanliness in the home, a serious lack of adequate parenting and worrying exposure to those engaged in sexual exploitation and possible sexual abuse of one or more of the children including T. The eight children were said to be suffering significant harm and at risk of so doing, based upon these numerous allegations. (at 1742)

The consultant paediatrician examined T and found that she had suffered penetrative sexual abuse. As T was 18 years old, the child protection legislation and wardship jurisdiction were no longer available to her. T's mother sought T's return to the family home. If she returned home or had regular contact with her parent there were serious grounds for concern about her safety. The Court considered the possibilities. It rejected guardianship under the Mental Health Act 1983 but noted that guardianship under the Mental Health Act 1959 'might well have been sufficient to meet the needs of T as set out by the local authority' (at 1743). Under the 1959 Act a guardian could restrict 'to such extent as he thinks necessary the making of visits to the patient and may prohibit visits by any person who the guardian has reason to believe may have an adverse effect on the patient' (r. 6(2) of the Mental Health (Hospital and

¹⁴ *Niemietz v Germany* (1993), 16 EHRR 97.

¹⁵ *Re F (Adult Patient)* [2000] 3 WLR 1740.

Guardianship) Regulations 1960). However, the 1983 Act changed this: it reduced the 'powers' of the guardian to a point where, even if available, they would have little impact in this case. The other factor preventing use of guardianship under the 1983 Act was that in an earlier hearing¹⁶ the court decided that T's wish to go home was not 'seriously irresponsible conduct' within s. 1(2) Mental Health Act 1983.

The Court was in a dilemma: it was unable to use the child protection legislation, wardship or the Mental Health Act 1983. Would it have to stand by and see T returned to an abusive and unsafe home environment? What other options were open to the local authority, which was anxious to protect T? The Court noted the lack of a statutory jurisdiction. Butler-Sloss P said,

A local authority was a creature of statute and there was no statutory justification for the control sought by the local authority to restrict where T should live or who should contact her. Although the local authority had duties under the philosophy of "care in the community", the care was voluntary and not directive. (at 1747)

The Court was compelled to use the doctrine of 'necessity'. Sedley LJ stated the problem faced by the Court in the following terms:

T is so unable to judge what is in her own best interests that no humane society could leave her adrift and at risk simply because she has reached the age of 18. (at 1756)

He concluded that, following *Re F (Sterilization: Mental Patient)*,¹⁷ the common law of necessity would in appropriate cases permit otherwise tortious interferences with the personal integrity of the mentally incapacitated. The court granted a declaration in favour of the local authority that T should remain in their care with limited family contact. In reaching this conclusion it referred to the proposals by the Law Commission. However, until legislation was in place, the courts were compelled fill the gaps in the law.

Butler-Sloss P pointed out the limitations of the case-by-case approach.

The assumption of jurisdiction by the High Court on a case by case basis does not, however, detract from the obvious need expressed by the Law Commission and by the Government for a well-structured and clearly defined framework of protection of vulnerable, mentally incapacitated adults, particularly since the whole essence of declarations under the inherent jurisdiction is to meet a recognised individual problem and not to provide general guidance for mentally incapacitated adults. Until Parliament puts in place that defined framework, the High Court will still be required to help out where there is no other practicable alternative. (at 1752)

The Court did not feel that the principle of necessity would provide the breadth of protection necessary. Sedley LJ said,

If returning to her mother is in truth a source of danger to her, I agree that ... the court may, by declaring what is in T's best interests, sanction not only the provision of local

¹⁶ *Re F (Mental Health Act: Guardianship)* [2000] 1 FLR 192.

¹⁷ [1989] 2 FLR 376.

authority accommodation (which in any case needs no special permission) but the use of such moral or physical restriction as may be needed to keep T there and out of harm's way. (at 1756)

This illustrates the weakness of the local authority's legal position, namely the problem of enforcing the declaration of the court. As Sedley LJ makes clear, the local authority has power to provide accommodation under the Community Care Act 1990 and National Assistance Act 1948. How could it ensure that this protective regime endures? The best he can suggest is that the authority resorts to 'moral or physical restriction'. Such restrictions are vague and of dubious legality especially since the advent of the HRA 1998. What happens if the parent of T ignores the moral or physical pressures? What statutory fallback is there, given that local authorities must have a legal (and invariably a statutory) basis for their actions? Historically the courts have been reluctant to undertake an ongoing responsibility for supervising orders that they make. Although it is impossible to disagree with the outcome of the case, the legal difficulties that it highlights re-emphasise the need for legislation. However useful necessity and best interests may be in a medico-legal context, they do not translate easily into the *Re F* circumstances, without straining the sinews that bind law and good practice to breaking point.

Another very important factor is the impact of the Human Rights Act 1998. The ECHR supports the status quo by emphasising the importance of autonomy. However, it also provides the basis for a much more compelling argument in favour of new law; indeed, it can be argued that the current lacuna in our law on vulnerable adult protection violates the ECHR.

The Impact of the HRA 1998

A number of ECHR rights are relevant in addressing the need for comprehensive legislation. They may be summarised as follows.

Inhuman and degrading treatment

Article 3 ECHR states that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

There has been a great deal of debate within the European Court about the meaning of 'inhuman or degrading treatment', and it is clear that a level of severity must be present. However, inhuman treatment that causes intense physical and mental suffering and degrading treatment that arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibly breaking their physical or moral resistance, falls within Article 3.¹⁸ One important factor in determining such treatment is the vulnerability of the victim. In *Ribitsch v Austria*,¹⁹ the European Court emphasised that the vulnerability of the victim – in this case a person detained by the Vienna police – was a relevant factor in

18 See *Ireland v United Kingdom* (1978), 2 EHRR 25.
19 (1995), 21 EHRR 573.

deciding whether Article 3 ECHR was violated. Similarly, in *X v Netherlands*,²⁰ the European Commission found that the sexual abuse in a privately run nursing home, of a 16-year-old woman with learning difficulty, caused mental suffering leading to psychiatric disturbance, and fell within Article 3.

This approach reinforces the argument for legal powers in relation to direct abuse by the state or somebody who falls within the definition of 'public authority' under s. 6(3) of the Human Rights Act 1998. The Court in *A v United Kingdom*²¹ discussed this point. The case involved the chastisement with a garden cane of a nine-year-old child by his stepfather. The court acquitted the stepfather of assault occasioning actual bodily harm, relying on the defence of 'reasonable chastisement'. The child took the case to the European Court arguing that there was a breach of Articles 3 and 8 of the ECHR. The Court held unanimously that there had been a breach of Article 3. The United Kingdom argued that, unlike corporal punishment in schools, the state was not directly responsible under the ECHR for its use in the home. The Court rejected this argument. It said,

The Court considers that the obligation ... under Article 1 ... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity. (para. 22)

Thus, the state has a positive obligation not only to avoid directly violating this right, but also to ensure that its laws are sufficiently robust to ensure that vulnerable people have adequate protection against such treatment in whatever setting. It is unlikely that in the context of vulnerable adult abuse, the United Kingdom could successfully argue that it fulfils this duty.

Respect for private and family life, home and correspondence

Article 8(1) ECHR states, 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

A crucial part of our private life is the right to self-determination. The government's assertion of the right to 'live in isolation' and to be free of interference by the state was one of the arguments against a new public law on vulnerable adult abuse. As noted above, in medical law the right to self-determination receives the utmost respect from the courts, as does the Mental Capacity Act 2005. It would be undesirable, and in violation of the ECHR, if new law introduced compulsory intervention in the lives of older people, on the basis of their age and our desire to 'do what is best for all of them'. A balance between autonomy and protection is required; in many respects, identifying the point of intervention is the challenge for any new legislation. For people who lack capacity, the decision on intervention is easier. As they cannot decide for themselves,

20 (1985), 8 EHRR 235.
21 (1998), 5 BHRC 137.

it would be wrong to ignore their plight. Whether the 'best interest' criterion is an adequate basis for intervention is debatable, but the need for intervention is clear. The Mental Capacity Act 2005 now provides a statutory basis for decision making for people who lack capacity. More difficulty arises when the person has capacity, but is vulnerable and at an unacceptable risk, for example the person described in scenario (1) above (mentally alert, but physically dependent person).

Under the ECHR, the right to private life is not absolute. Article 8(2) ECHR narrowly defines the circumstances in which Article 8(1) may be restricted by the state.²² The law must define the boundaries of the restriction to prevent arbitrary interference in private life. Unless intervention is authorised by the law, it cannot fall within Article 8(2). The law must ensure that the restrictions are reasonably precise and foreseeable. The European Court in *Halford v United Kingdom*²³ said it was entitled to look at the quality of the law forming the basis of the interference with Convention rights. It said,

In terms of the quality of the law, the Commission notes that the law must be compatible with the rule of law in providing a measure of protection against arbitrary interference by public authorities and, in this context, it must be accessible to the person concerned who must moreover be able to foresee the consequences of the law for him. (at para. 61)

In addition, there must be adequate safeguards against the arbitrary use of any powers under an adults-at-risk public law. The European Court of Human Rights in *HL v United Kingdom*²⁴ considered whether the House of Lords in *R v Bournewood Community and Mental Health NHS Trust, ex parte L (Secretary of State for Health and others intervening)*²⁵ were right to say that detention of an incapacitated patient was justified by the doctrine of necessity. The European Court concluded that 'this absence of procedural safeguards fails to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of Art 5(1) of the Convention' (at para. 124).

Article 8(2) determines that any restrictions on Article 8(1) may be legitimate if based on, inter alia, public safety, protection of health or morals, the prevention of disorder or crime, or the protection of the rights of others. No other reason than those found in Article 8(2) can justify a violation of Article 8(1). Seeking to justify intervention because it is 'necessary' or 'in the best interests of the client' will not be sufficient.

Finally, the restriction must be necessary in a democratic society: the Court in *Sunday Times v United Kingdom*²⁶ stated,

It is not sufficient that the interference belongs to that class of the exceptions listed [in 8(2)] which has been invoked ... the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it. (at para. 65)

²² See *Sunday Times v United Kingdom* (1979), 2 EHRR 245.

²³ (1997), 24 EHRR 523.

²⁴ [2004], 40 EHRR 761.

²⁵ [1998], 3 All ER 289.

²⁶ (1979), 2 EHRR 245.

Thus, intervention must depend upon the circumstances of each case and not result from the application of a general policy or overarching principles. For example, a law based entirely on the fact that an individual has obtained a certain age would be disproportionate and unnecessary to achieve the objective of the law.²⁷ A balance is necessary between the state's responsibility to prevent abuse and the protection of the individual's human rights.²⁸ Sweeping and disproportionate policies are unacceptable.²⁹

The three scenarios outlined above involve adults at risk refusing to 'consent' to intervention. Putting aside, for the moment, the possibility of duress, the question arises whether there ought to be any limits on an individual's autonomy in these circumstances. The case of *Laskey v United Kingdom*³⁰ involved a group of sadomasochists who had been successfully prosecuted under the Offences Against the Persons Act 1861. In their application to the European Court of Human Rights they emphasised that all those involved were willing and consenting. The United Kingdom argued that the state was entitled to punish violence irrespective of the consent of the victim. It likened some of the acts to torture and maintained that no state could be obliged to tolerate such behaviour simply because it took place in a consensual context; the state is entitled to prohibit acts because of their potential danger. The European Court found that the restrictions imposed on these activities were not a violation of Article 8 ECHR because they were necessary in a democratic society for the protection of health (under Article 8(2)). *Laskey* demonstrates that the responsibility of the state to protect the health of its citizens can override or restrict the autonomous interests of freely consenting adults. How much stronger, therefore, is the case for imposing such restrictions, through state intervention, on involuntary and vulnerable victims.

Guaranteeing the rights in the Convention

Article 1 of the ECHR requires the signatories to 'secure to everyone within their jurisdiction the rights and freedoms defined in article 1 of this Convention'. The European Court said in *Osman v UK*,³¹ a case on the Article 2 right to protection of life, that it was sufficient,

for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they ought to have knowledge. (para. 116)

This is consistent with the positive obligation referred to earlier in *A v United Kingdom*.³²

²⁷ *Handyside v United Kingdom* (Application 5493/72) (1976) 1 EHRR 737.

²⁸ *Soering v UK* (1989) 11 EHRR 439.

²⁹ *Open Door Counselling and Dublin Well Woman v Ireland* (Applications 14234/88, 14235/88) (1992), 15 EHRR 244.

³⁰ (1995) (Application 21627/93) (18 January 1995, unreported).

³¹ (1998), 5 BHRC 293.

³² (1998), 5 BHRC 137.

Freedom from discrimination

Article 14 prohibits discrimination in the enjoyment of ECHR rights on the grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The words 'other status' are capable of wide interpretation and include age and disability. This supports the view that the state has a responsibility for ensuring that vulnerable older people are adequately protected, in appropriate circumstances, from abuse.

Conclusion

The debate on a new public law designed to protect vulnerable older people is complex. At the one extreme, we could simply adapt current child protection legislation so that it includes vulnerable adults. Despite the problems identified by Lord Laming and others in the working of child protection legislation, the Children Act 1989 as amended is a tried and tested piece of legislation and provides a sound legal framework for public intervention. Brogden and Nijhar comment on this approach as follows:

A central tenet has been that children and elder persons are similarly vulnerable. The abuse paradigm that dominated research into elderly victimisation made key mistakes in drawing on this child abuse research. The latter led elder victimisation into a welfare trap. False parallels kept elder victimisation outside criminological concerns. (Brogden and Nijhar 2000, 18)

Tempting though it may be, there are dangers in drawing analogies between children and vulnerable adults at risk of abuse. Children (putting aside the *Gillick* principle)³³ do not enjoy the same degree of autonomy as adults. Paternalism is a concept that we normally apply to children. Arguably, the Law Commission based its proposals too firmly on child protection principles.

At the other extreme is the view that we do not need a new public law because the existing legal protection is adequate. There is an array of laws that can be used to protect vulnerable older people. These include the criminal law; there are offences that would cover financial, physical, sexual and psychological abuse. Section 44 Mental Capacity Act 2005 introduces the offence of ill-treating or wilfully neglecting a person who lacks capacity or whom the perpetrator reasonably believes to lack capacity; a similar provision is found in section 127 Mental Health Act 1983 in relation to patients under that Act. However, limited use is made of the criminal law – as noted above, the 'welfarist' approach risks screening out the possibility of criminal prosecutions in all but a few cases. Brogden and Nijhar argue that the label 'abused' implies incapacity to determine one's own fate. The term 'pathologises' victims by denying them competence. It renders them – in their own interest – outside of normal criminal law protections.' (2000, 14). Even with the special

33 *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

measures available under the Youth Justice and Criminal Evidence Act 1998, the state's welfarist approach to the abuse of older people has to be overcome.³⁴

In addition to the criminal law, public law measures exist that might be helpful in addressing acts of abuse or preventing their occurrence.

The Care Standards Act 2000, the Mental Health Act 1983 and the National Assistance Act 1948 make require or permit the intervention by public bodies in cases of abuse. However, they fall short of a coherent and widely applicable public law.

Between these two extremes, there is an approach that allows a sensitive response to be made to individual cases of abuse. The proposition is that it is possible to devise a public law permitting (indeed requiring) intervention by local authorities in cases of suspected abuse. Such a law would need to address the balance, discussed above, between the state's responsibility to protect (in particular from inhuman or degrading treatment) and the state's responsibility to respect and promote autonomy and independence. Such a public law can play its part in addressing abuse, but it is only one part of a more complex solution involving changing attitudes amongst young and old, abusers and abused, and society in general. In very broad terms, law may perform an educative role and help change attitudes. Nevertheless, public law has a role to play. Commenting on the American experience of elder abuse, Weed argues,

Until we can find a solution to the problem at its roots, and thus eliminate the problem, it is necessary to prevent as much of the suffering as possible. By providing an efficient and immediate method for intervention in life-threatening situations, with little sacrifice of autonomy, [the statute] takes a large step in the right direction. (1997, 903)

Public law should allow timely intervention by social workers, or others, before the point of unacceptable risk. The current guidance, *In Safe Hands* and *No Secrets*, is not enough. It is soft-law, without the backing of legislation.

What powers of intervention should be included in a new public law? The proposals in *Mental Incapacity* were noted above. The American model of mandatory reporting should be considered (Gardner Cravedi and Halamandaris 1981; Santo 2000; Silva 1992; Velick 1995). A duty to investigate along with powers of entry would allay some of the concerns of professionals. There must be procedural safeguards to ensure that intervention is lawful and compatible with the state's responsibilities under the ECHR; for example, it must meet the stringent conditions laid down in Article 8(2) of the ECHR. Such safeguards should include clearly defined criteria for intervention; restricting emergency intervention to a limited period; ensuring that a court or tribunal considers the appropriateness and legality of the intervention; and providing the subject of the intervention with an opportunity to be heard.

Who would a new public law be designed to protect? The California definition of 'endangered person' provides a possible working definition:

34 This Act introduces special measures that may be taken to assist defined categories of vulnerable adults in criminal proceedings (for example, giving evidence by live link, video-recorded evidence in chief, and the services of a support person).

a dependent or elder adult who is at immediate risk of serious injury or death, due to suspected abuse or neglect and who demonstrates the inability to take action to protect himself or herself from the consequences of remaining in that situation or condition.³⁵

How relevant is the consent or refusal of the alleged victim? Should autonomy prevail or should the state's responsibility to protect from harm override the consent of the individual? Consent is relevant, and in many situations will be the determining factor. Respect for autonomy will normally be decisive. However, an adult protection law must include the power to intervene even where the victim refuses help. In some cases the duty to respect private life should give way to the duty to protect life and limb. In making this judgement, issues such as level of risk, degree of vulnerability, and the very important doctrine of undue influence, are relevant. The doctrine is familiar to, but little used by, social welfare lawyers in Wales and England. It featured in *Re T (Adult: Refusal of Treatment)*³⁶ where Lord Donaldson MR had to consider the effect of outside influences (the patient's mother) on the free will of the patient. He said the question to ask is 'is it such that he can no longer think for himself?' (at 662).

Drafting such legislation will be very difficult. However, the Scottish legislation illustrates that it is possible to address the delicate balance between respect for autonomy and fulfilment of the responsibility to protect without relying on child protection principles. Similarly, the experience of America is that constitutional safeguards against the misuse of power by the state can be reconciled with protection laws.

There is a growing awareness of elder abuse. Help the Aged and Action on Elder Abuse jointly launched a campaign in 2006 to raise awareness of elder abuse. A new public law would be timely and would provide some protection for a particularly vulnerable section of society. It would also send out a message that elder abuse is something that the state takes seriously and that there can no longer be a blanket prohibition against state intervention based on an overstated case for autonomy.

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³⁵ Article 2, CA Wel & Inst § 15700.

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